No. 89-884

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BYRON DANIEL CRAWFORD, M.D.,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

**On Petition For Writ Of Certiorari To
The California Court Of Appeal,
Second Appellate District, Division One**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. If, as petitioner argues, the state contempt proceedings against him are criminal as a matter of federal constitutional law, is petitioner's petition untimely under Rule 20.1 because it was filed more than 60 days after the California Supreme Court's judgment?

2. Where petitioner never specifically asserted a federal due process claim during the state proceedings, did petitioner properly raise a federal question?

3. Where California statutory and case law provides that violations of judicial rules of practice and procedure, including rules of the Workers' Compensation Appeals Board, may constitute contempt, did petitioner have fair warning that his violation of Board Rule 10606 could result in contempt?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Workers' Compensation Appeals Board of the State of California (hereinafter, the Board or WCAB), respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the opinion of the California Court of Appeal, Second Appellate District, Division One, in this case. That opinion is reported at 213 Cal.App.3d 156, ____ Cal. Rptr. ____ (1989).

STATEMENT OF THE CASE

Petitioner is a psychiatric expert witness who, through an alter ego corporation, has been providing medical evaluation reports in workers' compensation cases in California since 1978. The corporation employs 20 to 30 persons, including psychologists, to take medical histories and to write the 50 to 80 reports generated by

the corporation each week. All of the reports, however, are signed solely by petitioner.

In 1986, several persons brought to the Board's attention certain alleged deficiencies in petitioner's reports. On April 29, 1988, after a lengthy and complex investigation, the Board issued a 106-page accusation, citation and order to show cause (hereinafter, "OSC") charging petitioner with 36 counts of contempt.

In essence, 31 of the 36 counts of contempt were based upon petitioner's alleged violations of Board Rule 10606. In relevant part, Board Rule 10606 provides:

> "If any person other than the physician who has signed the report has participated in the examination of the injured employee or in the preparation of the report, the name or names of such persons and their role shall be set forth, including the name [or names] of [the] person or persons who have taken the history, have performed the physical examination, [or] have drafted, composed or edited the report in whole or in part." California Code of Regulations, title 8, § 10606.

As to these 31 counts, it was alleged that petitioner willfully failed to identify the persons who took the medical histories and who prepared, or assisted in preparing, the medical reports submitted in several workers' compensation cases in 1985 and 1986; and/or that petitioner willfully misrepresented that he alone took the medical histories and prepared the reports.

Following the issuance of the OSC, petitioner filed a motion to dismiss it. Among other things, petitioner argued that Board Rule 10606 "is not sufficiently definitive to serve as a basis for contempt." In so arguing, petitioner cited California authority only. He did not refer to the Due Process Clause of the Fourteenth Amendment, nor did he otherwise specify that he was raising a federal due process claim. Petitioner's motion was denied.

Thereafter, petitioner filed a petition for writ of prohibition and/or mandate with the California Court of Appeal. Although petitioner again argued that Board Rule 10606 "is not sufficiently definitive to serve as a basis for contempt," he again relied upon

California authority only, and again failed to assert with particularity that he was raising a federal due process claim. The petition for writ of mandate and/or prohibition was summarily denied.

Subsequently, petitioner sought review by the California Supreme Court. In his petition for review, petitioner in essence reiterated his assertion that Board Rule 10606 is not sufficiently definitive to serve as a basis for contempt. Again, however, petitioner neither cited to the Due Process Clause of the Fourteenth Amendment, nor otherwise indicated that he was bringing a federal due process claim. The California Supreme Court granted review and transferred the matter to the Court of Appeal with directions to issue an alternative writ.

Following this transfer, the California Court of Appeal issued the opinion which is the subject of petitioner's instant petitioner of writ of certiorari. With respect to petitioner's due process argument, the Court of Appeal said:

> "Nor is there merit to petitioner's further assertion that rule 10606 is insufficient to apprise one of the possibility of a contempt citation for violating its provisions. Although rule 10606 does not specify contempt as a sanction for noncompliance, WCAB rule 10562 (Cal. Code Regs., tit. 8, ch. 4.5, § 10562) regarding failure to appear at a hearing similarly does not specify contempt as a sanction; yet, failure to comply with rule 10562 can result in a contempt finding. (*In re Hustedt* (1976) 41 Cal.Comp.Cases 501, writ den.; Cal. Workers' Compensation Practice (Cont. Ed. Bar 1985) § 6.38, p. 217.)" *Crawford v. Workers' Comp. Appeals Bd., supra*, 213 Cal. App.3d, at 169.

Nowhere in the Court of Appeal's discussion of petitioner's due process claim is there any reference to the federal Constitution.

Thereafter, petitioner sought rehearing by the California Court of Appeal. Yet, once more, petitioner nowhere indicated that his due process claim was in any way predicated on the federal, as opposed to the state, Constitution. Rehearing was denied, although the opinion was modified in respects not pertinent here.

Finally, petitioner sought review by the California Supreme Court for the second time. However, in making his due process claim, he again neither referred to the Due Process Clause of the Fourteenth Amendment nor otherwise specifically asserted a federal due process claim. Review was denied by the California Supreme Court on August 31, 1989.

REASONS WHY THE PETITION SHOULD BE DENIED

I

IF, AS PETITIONER ARGUES, THE STATE CONTEMPT PROCEEDINGS AGAINST HIM ARE CRIMINAL AS MATTER OF FEDERAL CONSTITUTIONAL LAW, THEN HIS PETITION IS UNTIMELY UNDER RULE 20.1 BECAUSE IT WAS FILED MORE THAN 60 DAYS AFTER THE CALIFORNIA SUPREME COURT'S JUDGMENT.

Although a petition for writ of certiorari in a civil case may be filed within 90 days after the highest state court's entry of judgment, 28 U.S.C. § 2101 (c), a petition for writ of certiorari in a criminal case must be filed within 60 days after that time. U.S. Sup. Ct. Rule 20.1, 28 U.S.C.; see also, R.L. Stern, E. Gressman & S. M. Shapiro, *Supreme Court Practice*, § 6.1, p. 301 (6th ed. 1986).

Here, petitioner argues that for purposes of determining his federal due process claim, the state contempt proceedings against him are criminal. Petition for Writ of Certiorari, at 8-9. Yet, if this is assumed to be true,[1] then petitioner's petition for writ of certiorari is untimely under Rule 20.1. That is, the petition for writ of certiorari was not filed until November 29, 1989, well over

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[1] But see, *Blackmer v. United States*, 284 U.S. 421, 440, 52 S.Ct. 252, 256, 76 L.Ed. 375 (1932); *Myers v. United States*, 264 U.S. 95, 103, 44 S.Ct. 272, 273, 68 L.Ed. 577 (1923) ["contempt proceedings . . . are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and [are] exercises of the power inherent in all courts to enforce obedience, something they must possess in order to properly perform their functions"].

60 days after the California Supreme Court's August 31, 1989 denial of petitioner's petition for review. Moreover, the period for applying for a writ of certiorari was not extended by a Justice of this Court. U.S. Sup. Ct. Rule 20.1, 28 U.S.C.. Accordingly, the petition for certiorari should be denied or dismissed as untimely.

II

BECAUSE PETITIONER NEVER SPECIFICALLY ASSERTED A FEDERAL DUE PROCESS CLAIM DURING THE STATE CONTEMPT PROCEEDINGS, HE FAILED TO PROPERLY RAISE A FEDERAL QUESTION.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257 that a substantial federal question was properly raised or necessarily decided in the state court proceedings. *Illinois v. Gates*, 462 U.S. 213, 217-222, 103 S.Ct. 2317, 2321-2324, 76 L.Ed. 2d 527 (1983); *Dept. of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 197, 85 S.Ct. 871, 873, 13 L.Ed. 2d 753 (1965); R. L. Stern, E. Gressman & S. M. Shapiro, *Supreme Court Practice* (6th ed. 1986), § 3.19, p. 144. Although a litigant need not follow any particular form in framing a federal question to a state court, "it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision [was] set forth." *New York Central & Hudson River Railroad Co. v. City of New York*, 186 U.S. 269, 273, 22 S.Ct. 916, 917, 46 L. Ed. 1158 (1901). Thus, where a litigant in state court asserts that "due process of law" was violated, without specifically referring the state court to the Due Process Clause of the Fourteenth Amendment, this Court will regard the litigant's "due process" contention as referring solely to the state Constitution, and not to the federal Constitution, where the state Constitution contains a due process clause. *Bowe v. Scott*, 233 U.S. 658, 664-665, 34 S.Ct. 769, 771, 58 L. Ed. 1141 (1914); *Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Co.*, 228 U.S. 326, 331-333, 33 S. Ct. 510, 512-513, 57 L. Ed. 857 (1912); *Thomas v. Iowa*, 209 U.S. 258, 262-263, 28 S.Ct. 487, 488-489, 52 L. Ed. 782 (1907); *Miller v. Cornwall R. Co.*, 168 U.S. 131,

134-135, 18 S.Ct. 34, 35, 42 L.Ed. 409 (1987).[2] The California Constitution, of course, contains a due process clause. (Cal. Const., art. I, §§ 7, 15).[3]

Here, petitioner did raise a due process issue in the state contempt proceedings. In so doing, however, he did not cite to the Due Process Clause of the Fourteenth Amendment of the federal Constitution nor otherwise specifically assert a federal due process claim. Petitioner, therefore, must be regarded as having invoked in state court only the due process clause of the California Constitution. *Bowe, supra; Consolidated Turnpike Co., supra; Thomas, supra; Miller, supra.* Accordingly, no substantial federal question was raised, and this Court lacks jurisdiction to consider petitioner's due process claim.[4]

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[2] *Cf., Henderson v. Georgia,* 295 U.S. 441, 442-443, 55 S.Ct. 794, 794-795, 79 L. Ed. 1530 (1934) [a general assertion in state court that a statute was in violation "of the Constitution of the United States," without a specific assertion that the statute contravened the due process clause of the Fourteenth Amendment, did not properly raise a federal due process question]; *Harding v. Illinois,* 196 U.S. 78, 86-88, 25 S.Ct. 176, 178-179, 49 L. Ed. 394 [same]; *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248, 22 S.Ct. 120, 124, 46 L. ed 171 (1901) [same].

[3] Article I, section 7, of the California Constitution provides in relevant part that "[a] person may not be deprived of life, liberty, or property without due process of law . . . "

Article I, section 15, of the California Constitution provides in relevant part that "[p]ersons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law."

[4] It should be noted that not only did petitioner fail to raise any federal due process issue, but also that the California Court of Appeal did not purport to decide any federal due process question.

III

PETITIONER HAD FAIR WARNING THAT HIS VIOLATION OF BOARD RULE 10606 COULD RESULT IN CONTEMPT (1) BECAUSE IT HAS LONG BEEN HELD IN CALIFORNIA THAT THE FAILURE TO COMPLY WITH A JUDICIAL TRIBUNAL'S RULE PERTAINING TO THE ORDERLY CONDUCT OF PROCEEDINGS BEFORE IT MAY BE PUNISHABLE AS CONTEMPT, (2) BECAUSE, CONSISTENT WITH THIS PRINCIPLE, THE BOARD HAS CONSISTENTLY HELD THAT VIOLATIONS OF ITS RULES MAY CONSTITUTE CONTEMPT, AND (3) BECAUSE, PRIOR TO THE INSTANT CASE, THE BOARD SPECIFICALLY INDICATED THAT PHYSICIANS SUBMITTING MEDICAL REPORTS WITHOUT PERFORMING THE PHYSICAL EXAMINATION, TAKING THE MEDICAL HISTORY, OR REVIEWING THE MEDICAL RECORDS WOULD BE SUBJECT TO CONTEMPT.

The essence of petitioner's argument is that he did not have fair warning that a violation of Board Rule 10606 could result in contempt. Petition for Writ of Certiorari, at 8-12. Petitioner, however, did have fair warning.

Subdivision (a) of section 1209 of the California Code of Civil Procedure specifically provides, in relevant part, that:

> "The following acts or omissions . . . *are contempts of the authority of the court:*
>
> * * *
>
> "(4) Abuse of the process or proceedings of the court . . . ;
>
> "(5) Disobedience of any lawful judgment, order or process of the court; [or]
>
> * * *
>
> "(8) Any other unlawful interference with the process or proceedings of the court . . . " California Code of Civil Procedure section 1209, subdivision (a), emphasis added.

Section 1209 (a) and its statutory predecessors have contained these provisions for over 100 years.[5] Moreover, under California Labor Code sections 134 and 132, the Board since its inception has been empowered to punish contempts of its authority pursuant to California Code of Civil Procedure section 1209.

Petitioner implies that he could not know that his failure to comply with Board Rule 10606 could subject him to contempt under California Code of Civil Procedure section 1209(a). Yet, Board Rule 10606 is a duly adopted rule of practice and procedure. See, California Labor Code section 5307; *Crawford v. Workers' Comp. Appeals Board, supra*, 213 Cal.App.3d, at 167-168; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (Gregory) 87 Cal.App.3d 336, 357, 151 Cal. Rptr. 368 (1978). And it has long been the law in California that a violation of a judicial tribunal's rule of practice and procedure, which rule pertains to the orderly conduct of proceedings before it, can be contemptuous under California Code of Civil Procedure section 1209(a) if that violation constitutes a significant abuse of or interference with the tribunal's process or proceedings. *Cantillon v. Superior Court*, 150 Cal.App.2d 184, 187-188, 309 P.2d 890 (1957); cf., *United States v. Marthaler*, 571 F.2d 1104, 1105 (2d Cir. 1978). Moreover, the Board has long held, as summarily affirmed by the California appellate courts, that violations of its rules of practice and procedure can constitute contempt under California Code of Civil Procedure section 1209.[6] Indeed, in *In re*

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[5] When California Code of Civil Procedure section 1209 was first enacted in 1872, it contained all of the language quoted above, and that language has been retained through each of its subsequent amendments. Cal. Stats. 1891, ch. 9, § 1, p. 6; Cal. Stats. 1907, ch. 255, § 1, p. 319; Cal. Stats. 1939, ch. 979, § 1, p. 2731; Cal. Stats. 1975, ch. 836, § 2, p. 1896; Cal. Stats. 1982, ch. 510, § 2, p. 2286.

[6] See, e.g., *In re McDonnell Douglas Corp.*, 44 Cal.Comp.Cases 1070 (Board en banc, 1979), writ den. sub nom. *Keeney v. Workers' Comp. Appeals Bd.*, 46 Cal.Comp.Cases 39 (1981) [failure to timely serve medical reports, in violation of Board Rules 10608 and 10615, Cal. Code Regs., tit. 8, §§ 10608, 10615, is contempt of Board]; *In re State Comp. Ins. Fund*, 40 Cal. Comp. Cases 674 (Board en banc, 1975), writ den. sub nom. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 41 Cal.

Nussdorf, 46 Cal.Comp.Cases 189 (Board en banc, 1981), the contempt case which formed the basis for Board Rule 10606, the Board specifically declared (1) that it was misleading for a physician to submit a medical report under his signature and letterhead when he had not performed the injured worker's physical examination, taken the medical history, or reviewed the medical records; (2) that this practice would not be condoned by the Board in the future; and (3) that this opinion would serve as a guide for what would henceforth be expected of physicians submitting medical evaluation reports in workers' compensation cases in California.

Accordingly, it cannot be said that petitioner lacked fair warning that his alleged violations of Board Rule 10606 could result in contempt, or that, in upholding the Board's contempt proceedings, the California Court of Appeal was making an "ex post facto" interpretation of Board Rule 10606, retroactively making its violation subject to contempt.

Comp. Cases 312 (1976) [same]; *In re Lee*, 44 Cal. Comp. Cases 331 (Board en banc, 1979) [ex parte communication in violation of Board Rule 10324, Cal. Code Regs., tit. 8, § 10324, and failure to seek judge's prior authorization for consultative permanent disability rating in violation of Administrative Director Rule 9758, Cal. Code Regs., tit. 8, § 9758, is contempt of Board]; *cf., In re Hustedt*, 41 Cal. Comp. Cases 501 (Board en banc, 1976) [failure to appear at Board conference, which is a violation of Board Rule 10562, Cal. Code Regs., tit 8, § 10562, is contempt of Board].

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be dismissed or denied.

Respectfully submitted,

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ENTRY OF APPEARANCE

SUPREME COURT OF THE UNITED STATES

No. 89 - 884

Byron Daniel Crawford, M.D.
[Petitioner]

v.

Workers' Comp. Appeals Bd.
[Respondent]

The clerk will enter my appearance as Counsel of Record for the Workers' Compensation Appeals Board, who in this Court is Respondent.

I certify that I am a member of the Bar of the Supreme Court of the United States:

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CERTIFICATE OF SERVICE

I, Richard W. Younkin, a member of the Bar of this Court, hereby certify that on this 27th day of December, 1989, three copies of Respondent's Brief In Opposition in the above-entitled case were mailed, first class postage prepaid, to Robin B. Johansen, Esq., 220 Montgomery Street, # 800, San Francisco, California, 94104, the cousel of record for petitioner herein. I further certify that all parties required to be served have been served.

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